In the High Court of Judicature at Madras

Dated: 08/11/2004

Coram

The Hon'ble Mr.Justice P.SATHASIVAM
and
The Hon'ble Mr.Justice M.THANIKACHALAM

Criminal Appeal No.479 of 2002

1. A.Chinnanan
2. P.Kandasamy ..Appellants

-Vs-

State rep.by
Inspector of Police,
Attaiyampatti Police Station,
Salem District. ..Respondent

Criminal Appeal under Section 374 of Criminal Procedure Code filed against the judgment dated 29.01.2002 in S.C.No.128 of 2001 on the file of Additional Sessions Court-cum-Fast Track Court No.1 at Salem.

!For Appellants : Mr.T.Sudanthiram

^For Respondent : Mr.E.Raja,
Additional Public Prosecutor.

:JUDGMENT
(Judgment of the Court was delivered by M.THANIKACHALAM,J)
The accused in S.C.128 of 2001 on the file of Additional Sessions Judge-cum-Fast Track Court No.1, Salem, who have been convicted under Sections 302 read with 34, 506(II) and 376 IPC, are the appellants.

2. The respondent Police filed a final report against the appellants / accused, seeking appropriate punishment for them, under Sections 302 read with 34, 376 and 506(II) IPC, on the grounds that, due to previous enmity, the accused with an intention to commit murder, having common intention, on 01.08.1999 at about 7.00 pm, committed murder of one Mani by strangulating his neck, that at the same time, against the wish of Suseela (P.W.1) and without her consent, had committed rape and that after committing the above said two offences, both the accused threatened and criminally intimidated the said Suseela, not to divulge the incidents to anybody, and therefore, the accused should be dealt with accordingly.

3. The learned trial Judge, upon perusal of the materials, having

satisfied, prima facie that the offences are made out against both the accused, framed charges, questioned, for which, both the accused / appellants refused to plead guilty.

4. The Prosecution, in order to prove the guilt of the accused, as per the charges framed against them, had marched in 10 witnesses, sought aid from 26 documents as well 8 material objects.

5. The learned Additional Sessions Judge (Fast Track Court-I), Salem, evaluating the above materials, scanning the evidence, coupled with the law and the judicial precedent, came to the conclusion, that both the accused are responsible for the death of Mani, since they have committed murder by strangulating him, that both the accused had committed sexual assault upon P.W.1, thereby they landed themselves within the arena of section 376 IPC and that, both the accused had, in order to screen the offences, threatened criminally the only eye witness, as well as the victim, namely, P.W.1, as claimed by the prosecution. Thus concluding, the trial court had convicted and sentenced both the accused, to undergo life imprisonment for the offence under section 302 read with 34 IPC and each to pay a fine of Rs.1000/=, with default clause, to undergo two years rigorous imprisonment for the offence under section 506(II) IPC, and to undergo seven years rigorous imprisonment for the offence under section 376 IPC, which are under challenge in this appeal.

6. The facts, leading to the conviction, in brief, are as follows:-
(a) Tmt.K.Suseela (P.W.1) was living alone with her children in Lakshmanur, since her husband had deserted her. One Mani, by profession Tailor, had intimacy with P.W.1, since she used to go to his place often and this affair continued for six months.

(b) Selvam (P.W.4), Venkatesan (P.W.5), who are the residents of Ariyanur, had leasehold right over the Veerapandi lake for fishing, and for that purpose, they had put up a hut on the bund of the lake, which will be unlocked and vacant, during the night hours.

(c) On 01.08.1999, Sunday, P.W.1 went to the hut, at about 7.00 pm, where her paramour Mani was lying in a cot. When both of them were chatting, the accused went there, questioned the conduct of P.W.1, then requested her to accommodate for them also, for which, P.W.1 refused, stating that, she is living with Mani, since Mani is treating her as his wife, providing food and shelter. Aggrieved by the conduct of P.W.1, in order to eradicate Mani, 1st accused strangulated him with M.O.4 rope, while the 2nd accused pressed his legs, thereby taking away the life of Mani. P.W.1, on seeing the murder, attempted to raise her voice, which was prevented by the accused. Thereafter, both the accused undressed P.W.1, sexually assaulted her, committing rape repeatedly, not only in the hut, but also outside the hut when P.W.1 attempted to escape, despite her fervent plea to spare her, since she was unable to bear the torture. After committing the rape, both the accused threatened P.W.1 not to divulge to anyone, and left the place. P.W.1, the victim of rape and the eye witness for the murder, apprehending further trouble and problem from the hands of the accused, failed to disclose the same to anyone and kept quiet

till 02.08.1993 at 3.00 pm.

(d) P.Ws.4 and 5, the owners of the hut, having gone to the hut, had seen Mani, dead and it appeared to them, it was natural death. Therefore, both of them, informed the death to the relatives of Mani, including his wife P.W.3, and his mother, and burnt the body on the same day. P.W.1, who had connection with Mani, which is known to everybody, failed to make her appearance, and therefore, P.Ws.4 and 5 had sent for her, and upon enquiry, she divulged the incidents to them on 02.08.1999, at 3 pm. Immediately, both of them took P.W.1, to the Village Administrative Officer P.W.2, to whom, she had narrated the incidents, which was reduced into writing as Ex.P-1. P.W.2 handed over Ex.P-1 along with Ex.P-3, to the Inspector of Police, who registered a case in Crime No.671/99 under sections 302 and 376 IPC.

(e) In pursuance of the first information report registered, Inspector took the investigation, inspected the scene of crime, prepared observation mahazar, sketch, etc., in addition, recording the statements of the witnesses then and there. P.W.1 and the accused were also subjected to medical examination, in order to find out, whether the accused are capable of performing sexual activities, and whether P.W.1 was subjected to rape. The certificates given by the doctors, statements recorded by the Investigating Officers then and there, brought to surface that the accused, had committed the murder of Mani, as well committed rape upon P.W.1, and in this view, as herein beforementioned, final report has been filed, leading to trial, ending in conviction, which is sought to be assailed, in this appeal.

7. Heard the learned counsel Mr.Sudanthiram for the appellants and Mr.E.Raja, the Additional Public Prosecutor.

8. The learned counsel for the appellants, Mr.Sudanthiram submitted that the conviction and sentence slapped upon the accused / appellants, by the trial court, are unsustainable under law, on the following grounds viz;
(i) that the oral evidence of P.W.1, though she claims as eye witness for murder and victim of rape is not at all dependable, reliable, since her evidence is contradictory to all the probabilities, naturalities, having self contradiction, and in this view, it is unsafe to convict the accused;
(ii) that the delay in preferring the complaint, for the offences said to have been committed by the accused, creates doubt, since the delay is not at all explained acceptably;
(iii) that there is mutually contradictory evidence, regarding the origin of the complaint, namely, Ex.P-1, creating spontaneous doubt, and its benefit should go automatically in favour of the accused, entitling them, to an acquittal;
(iv) that to construe P.W.1 was the victim of rape, there is absolutely no medical evidence, and in fact, the oral evidence of P.W.1, is not corroborated, since it has its inherent defects also, and in this view, placing reliance upon her uncorroborated oral testimony, conviction cannot be sustained;
(v) that the Investigating Agency had suppressed many material facts,

including the wound certificate issued by the doctor originally to P.W.1, thereby suppressing the genesis of the case, and concocting a story of their own, which is also not at all proved by letting in satisfactory evidence; and (vi) that the trial court, unfortunately without properly analysing the above materials, erroneously convicted the accused, which requires setting aside, by the interference of this court.

On the above lines, the learned counsel for the appellants, Mr. Sudanthiram submitted that, the appeal, deserves its acceptance, and the accused are entitled to an acquittal.

9. The learned Additional Public Prosecutor, opposing the above arguments, submitted that, to prove the offence under section 376 IPC, the oral evidence of the prosecutrix alone is sufficient, as repeatedly held by the Apex Court, and no corroboration is necessary; that the victim, P.W.1 had categorically deposed about the acts of the accused, while committing the rape as well as their acts in murdering Mani, which is natural, as rightly held by the trial court and, therefore, even in the absence of corroboration, the conviction imposed by the trial court should sustain, not to be int erfered with, or upset.

10. The first charge against the accused is that, they have committed the murder of one Mani, who is the husband of P.W.3. The individual overt act alleged against the 1st accused is that, he strangulated Mani, by using a rope, which is exhibited as M.O.4. The individual overt act attributed to the 2nd accused is that, he caught hold of the deceased, without giving any chance for the deceased, to move about and escape. In this view, it is said, both the accused are liable to be convicted under section 302 read with 34 IPC. Though a feeble attempt has been made to say that there was previous enmity between the deceased and the accused, none had spoken about this. Even the concubine of Mani, who has been examined as P.W.1, has not whispered even a single word, about the alleged motive. She would say that, when she was chatting with Mani, both accused came, and there was wordy altercation questioning the chastity, followed by strangulation immediately. The way in which P.W.1 had given evidence, regarding the murder incident, appears to be most highly artificial and unbelievable. Therefore, when the alleged eye witness account is, prima facie undependable, on the basis of the following attending circumstances, then there is nothing wrong, expecting corroboration from other witnesses, or other attending circumstances, or independent sources, thereby to remove the undependability of P.W.1.

11. Concedingly, we find no corroboration, by scanning the evidence meticulously, and the learned Additional Public Prosecutor also failed to enlighten us, who had corroborated the oral testimony of P.W.1, regarding the motive part. In this view, it should be held that the motive vanishes. If at all, any motive could be attributed, it could be attributed to P.W.1 alone, and nothing more. For this also, there could be a presumption, which is not permissible, and on this basis also, we are unable to think, that the accused might have committed the murder of Mani, by strangulating. The doubt, which had arisen, in the absence of motive, if erased by the convincing evidence, motive can be sidelined, no problem.

12. In this context, we have to see, the basic documents, which set the law in motion. As per the case of the prosecution, the murder took place on 01.08.1999 at about 7.00 p.m. within the territorial jurisdiction of Attayampatti Police Station, near Veerapandi Village. For this incident, undisputedly, the complaint has been given only on 02.08.1999 at about 4.00 pm, whether it is to the police station or to the Village Administrative Officer, as the case may be, on which basis, a case has been registered. P.W.1 claims, that she had seen the murder of her paramour, and according to the prosecution, she is the victim of rape also, which are all serious offences. In the ordinary course, if this kind of offences had taken place, the victim as well as the eye witness, would react so quickly, to seek redress. To eclipse this normality, a story is thought of, as if the accused have threatened P.W.1 not to divulge. If that is the case, voluntarily, she would not have disclosed the offences or the acts of the accused to anybody and if at all the offences would have surfaced spontaneously, from some other sources, then upon investigation, P.W.1 should have corroborated, and there cannot be any unnatu rality in explaining the delay. But, in this case, more or less, after 19 hours or so, Ex.P-1 was given, and the delay is not at all explained, and an attempt to explain the delay, is also unacceptable to us. Even otherwise, if Ex.P-1 is properly proved, we can ignore the delay and in this case, that is also not at all possible, since there is a strong unquestionable unexplained doubt, to whom Ex.P-1 was given.

13. P.W.1 had stated that P.Ws.4 and 5 have taken her to the President of the Panchayat, where she had narrated the incident, who directed her, to go to the police station. She has further emphatically stated that, as per the direction given by the President of Panchayat, she went to the police station, disclosed everything, which was reduced into writing, in which, she had also signed, and according to P.W.1, that document is Ex.P-1. If P.W.1 is the dependable witness, the above evidence given by her, must be true, even according to the case of prosecution, ignoring the defence. But unfortunately the evidence, so given by P.W.1, regarding the origin of Ex.P-1, was clouded and shadowed by Village Administrative Officer, who has been examined as P.W.2. It is not even elicited from P.W.1, by way of reexamination, that she had stated, as President instead of Village Administrative Officer. In the absence of any such clarification, on reexamination, the oral evidence of P.W.1 regarding Ex.P-1 stands as such.

14. P.W.2, the Village Administrative Officer would state, that when he was in his office at about 4.00 pm, P.Ws.4 and 5 brought P.W.1, to his office and P.W.1 gave a confession statement, which was reduced into writing, later handed over to the police, along with Ex.P-3. Thus, regarding the origin of Ex.P-1, mutually contradictory, intrinsic evidence is available and therefore, the case, said to have been investigated on that basis, naturally weakens to some extent. Even ignoring the above inconsistency, as mistake of fact, emanated from the mouth of P.W.1, who is a rustic woman, to sustain the conviction, the improbability and the conduct of PW1, stood as stumbling block, which was totally ignored by the trial court.

15. The non-disclosure of the incident by P.W.1 could be accepted, if it is the case of the prosecution, that she has not witnessed the murder. If it is further proved scientifically that, Mani died due to homicide and not

for any other reason, then also the oral evidence of P.W.1, could be accepted to some extent, since it is said, that she was threatened criminally by the assailants. After the incident, the persons, who have seen the body of Mani, were P.Ws.4 and 5. If it is a homicidal death, they should have suspected the involvement of somebody and in that case, they should have reported the matter to the authorities concerned. Here, it seems, P.Ws.4 and 5, even without properly informing the death to the near relatives of the deceased, had burnt the body, which creates unformidable doubt, entitling the accused to get the benefit of doubt, undeniably.

16. It is the case of strangulation, according to the prosecution, by using M.O.4. Therefore, in the ordinary course, the body should have consequential effect, such as ligature marks over the neck, protruding tongue and some changes in the face of the deceased, which are commonly available, in a case of strangulation. P.Ws.4 and 5 have categorically deposed that, they have not seen any injury over the body of Mani, and the relevant portion in Tamil reads as follows:
@ehd; ghh;f;Fk;nghJ mtUila clk;gpy; ve;j ,lj;jpYk; fhak; ,y;iy///@
P.W.4 has further deposed, during the examination in chief itself, that on seeing the body of Mani, they came to the conclusion, that death occurred to Mani, naturally and therefore, they had burnt the body. Assuming that P.Ws.4 and 5 had come to the conclusion that Mani met natural death, then the natural course must be followed, namely, taking the body of Mani to his house, informing the near relatives, performing the last rites, inviting the wife, other relatives, etc,. It appears, even the wife of Mani, has not been informed, since the wife, as P.W.3, had said, that she had seen her husband's body only in the cremation ground. According to her, his face was all right, not disclosing any external symptoms of strangulation. Under the above said circumstances, in our considered opinion, sustaining conviction for 302 I.P.C., based upon the uncorroborative, undependable oral evidence of P.W.1, is unsafe, which is further strengthened by the improbability available regarding the offence under Section 376 I.P.C., which we will discuss infra. In this case, both the offences are interconnected, unseparable, and therefore, to acquit the accused under Section 302 I.P.C., convicting the accused under Section 376 I.P.C., is an impossibility.
17. The trial Court proceeded on the basis that the death of Mani was admitted, place of incident was admitted and therefore, the death should have been caused as claimed by the prosecution. While appreciating the evidence of an eye witness, the answers elicited during the cross examination also should be analysed, coupled with other part of the evidence, assessing whether the oral evidence of the eye witness is corroborated, confirmed or contradicted, so as to say, the theory of prosecution is unbelievable or believable. In this case, as seen from the oral evidence of P.Ws.4 & 5, who have seen the body at the first instance, certainly had not suspected any external hands in the death of Mani, whereas without any influence, they have satisfied themselves, by seeing the body, that it is a natural death, not homicidal one.

18. In a case of strangulation, as pointed out by us, there should be external symptoms, that too, when the strangulation is said to have been committed by using the rope like M.O.4. The alleged recovery of M.O.4 alone

will not satisfy, that the same was used as a weapon, to commit the offence, unless that weapon is identified, by the eye witness, in addition, the weapon having any other symptoms such as blood stain, to conclude that it could have been used for murdering the person concerned. In this case, the weapon viz., M.O.4 itself is doubtful. Forgetting all these things, the learned trial Judge, mostly relying upon the arrest and confession, presumed, which is not available under law, as if M.O.4 had been used by A1 to strangulate Mani, which was abetted by the second accused, by pressing the legs of the deceased. If P.Ws.4 & 5 had noticed any external injury over the neck of the deceased, and that injury was correlated with rope marks, such as M.O.4, then the evidence of P.W.1 should have its credence. Admittedly, the witnesses, who have seen the body, after the incident, had not noticed any symptoms, and the wife of the deceased also had not noticed any symptoms of homicide, over the face of the deceased, when she saw the body in the cremation ground. This being the position, it is unfortunate that the trial Court had come to the conclusion, that it is a homicidal death, for which the accused are responsible.

19. For committing this offence, by the accused, no motive has been alleged acceptably, whether motive is the criterion or not. It is the case of the prosecution, that when the deceased and P.W.1 were chatting together, the accused had been there, called the lady, which was refused, leading to other incidents. Even by overpowering the deceased, without committing murder, the accused could have very well committed the rape, if they had decided to satisfy their lust. Really had the accused committed murder of the deceased Mani, it is doubtful, in continuity, whether they would have committed rape upon P.W.1 consecutively, not only within the hut, but also outside the hut, within the interval of one hour or +, as the case may be. The evidence so given by P.W.1, that as if having the dead body, the accused have committed rape also, prompts us to think, that there is something wrong, in the prosecution case and the prosecution has not projected the real case, seeking redress. The improbability coupled with non disclosure of the crime, by P.W.1 forthwith creates formidable doubt, giving its benefit to the accused and therefore, we are inclined to hold that convicting the accused under Section 302 I.P.C., solely depending upon the oral evidence of P.W.1 is unsafe and in this view, the accused are entitled to acquittal under Section 302 I.P.C.

20. In a case of sexual assault, i.e. rape, as held by the Apex Court, the oral evidence of Prosecutrix alone is sufficient, provided it commands respect and dependability of the Court. When the veracity of the evidence given by P.W.1 is doubtful, there is nothing wrong, expecting certain kind of corroboration, from other evidence, such as medical evidence in addition to other attending circumstances.

21. In Aman Kumar v. State of Haryana (2004 SCC (Cri) 1266), it is ruled by the Apex Court as follows:

"It is well settled that a prosecutrix complaining of having been a victim of the offence of rape is not an accomplice after the crime. There is no rule of law that her testimony cannot be acted upon without corroboration in material

particulars. She stands on a higher pedestal than an injured witness. In the latter case, there is injury on the physical form, while in the former it is both physical as well as psychological and emotional. However, if the court of facts finds it difficult to accept the version of the prosecutrix on its face value, it may search for evidence, direct or circumstantial, which would lend assurance to her testimony. Assurance, short of corroboration as understood in the context of an accomplice, would suffice."

22. The learned counsel for the appellants submitted, that in this case, since the medical evidence on record not only failed to support the case of the prosecution, but also contradicted by P.W.1, accepting the oral evidence of P.W.1 alone, convicting the accused under Section 376 I.P.C. is unsafe, drawing strength from the decision of the Apex Court in Devinder Singh v. State of H.P. (2004 SCC (Cri) 185), wherein it is held:

"It would appear from the medical evidence on record that no evidence could be found by the medical officer to prove that she had been subjected to sexual assault by five persons. Having regard to the facts and circumstances of the case, particularly in view of the fact that the prosecutrix was habituated to sexual intercourse and was examined six days after the occurrence, the fact that no injury was found on her body only goes to show that she did not put up any resistance. That may be on account of the fact that she was overpowered by five persons and as described by her, they kept her legs and hands pressed. The medical evidence on record, however, does not affirmatively support the case of the prosecution and the prosecution can, therefore, derive no support from the medical evidence on record."

Having the above principles as useful guide, first we would consider the medical evidence available on record, regarding the alleged rape.

23. At the request of the investigating officer, P.W.6 examined P.W.1, on 4.8.1999 at about 12.30 p.m. She had noticed the following injuries:
1. Abrasion over the chin 1 cm.
2. Sub conjunctival haemorrhage in both eyes.
3. Multiple small abrasion over the left breast.

This certificate is dated 3.8.99, though it says the victim was examined on 4.8.1999, thereby creating some doubt whether the victim was examined on 3.8.1999 or 4.8.1999, as the case may be. Another wound certificate dated 4.8.1999 was produced and exhibited as Ex.P.13, through P.W.6. This wound certificate reads, that Susila was sent with a memo dated 3.8.99 and she was examined on 4.8.99 at 12.30 p.m., the same date and time, as mentioned in Ex.P.12. If the victim was examined by the same doctor on the same day, at the same time, both certificates should contain the same kind of injuries and there cannot be any variation generally. In Ex.P.13, the injuries noted are:
1. Hymen ruptured.
2. Vagina, Breast well developed.
3. Abrasion over chin 1 cm. (healing)

4. Sub conjunctival hemorrhage in both eyes.
5. Multiple small abrasion over left breast (healing) could not be caused by teeth bite.

This certificate is signed on 6.11.2000 i.e. after the filing of the final report.

24. The learned counsel appearing for the appellants brought to our notice, an another wound certificate available in the file, though not marked dated 3.8.1999, which says that the victim was seen by the doctor on 4.8.1999 and examined, wherein we find the following observation regarding the injuries:
Vulva - Vulval Moniliasis
Vagina - Healthy, Vaginal Smear taken
Hymen - ruptured
Fourchette- intact
Perineum - intact
Cervix - healthy

Injuries to cheek, lips, thigh, genitals- Nil

Thus it is seen, as per this certificate, there was no injury to P.W.1 over cheek, lips, thigh and genitals.

25. Contrary to this certificate, a document dated 6.11.2000 was introduced, after filing the final report, wherein alone, we find as if the victim had abrasion over the left breast, hymen ruptured, etc., thereby creating an unclear doubt, regarding the injuries said to have been sustained by P.W.1, during the commission of the offence viz., rape. When this was brought to notice of the learned Additional Public Prosecutor, he was unable to explain how an wound certificate dated 6.11.2000 came to be filed before the trial Court, when a wound certificate dated 4.8.99 was filed, wherein no injury has been noticed as pointed out supra. On the other hand, the Additional Public Prosecutor submits, that under Section 173 of Cr.P.C., the police is competent to file additional evidence gathered during investigation, even after the filing of the charge sheet and therefore, in this case, Ex.P.1 3 was filed, which cannot be find fault. We are unable to find any records indicating, that permission was granted by the Court to file Ex.P.13, after the filing of the final report and we are unable to find any materials also, informing the Court that the copy of Ex.P.13 was given to the accused.

26. The law is well settled as declared by the Apex Court in CBI v. R.S. Pai (2002 SCC (Cri) 950) that under the scheme of sub section 8 of Section 173 Cr.P.c., even after the charge sheet is submitted, there is no question of not permitting the prosecution to produce additional documents, which were gathered prior to or subsequent to the investigation. The relevant portion reads:

"If some mistake is committed in not producing the relevant documents at the time of submitting the report or the charge-sheet, it is always open to the investigating officer to produce the same with the permission of the court.

In our view, considering the preliminary stage of prosecution and the context in which the police officer is required to forward to the Magistrate all the documents or the relevant extracts thereof on which the prosecution proposes to rely, the word " shall" used in sub-section (5) cannot be interpreted as mandatory, but as directory. Normally, the documents gathered during the investigation upon which the prosecution wants to rely are required to be forwarded to the Magistrate, but if there is some omission, it would not mean that the remaining documents cannot be produced subsequently."

On the above settled position of law, entertaining Ex.P.13 is permissible. But to act upon this document, it should be in conformity with other evidence and it should not have the effect of extinguishing the evidence available already on record, causing prejudice to the accused, since the accused was supplied only with Ex.P.12 and another certificate which was marked, wherein the doctor has not noticed any external injury.

27. The victim was examined by the doctor only once i.e. on 4.8.1999 at about 12.30 p.m. as disclosed by all the documents, whether it is accepted or not. Therefore, all the documents should have the same effect regarding the nature of the injury, since the victim was examined only after the incident. If any opinion has to be awaited from the forensic department, on that basis, any wound certificate is given, at later point of time, then there may be variance, not otherwise. When the doctor has very clearly stated, that there was no injury over the body of P.W.1 viz., over lips, thigh, genitals, it is not known how she incorporated the injuries in Ex.P.13, which came into existence only on 6.11.2000. Further Ex.P.13 says, under the 5th injury "could not be caused by teeth bite". From the inconsistent medical evidence available, the evidence of P.W.1 should be assessed with great caution, care and certainty. Having the above facts, regarding the injuries sustained by P.W.1, we would analyse the oral evidence of P. W.1.

28. As submitted by the learned Additional Public Prosecutor, undoubtedly, P.W.1 has given evidence, attracting all the ingredients required under Section 376 I.P.C. She had categorically stated, that the accused pressing her mouth, removed the jacket, saree and thereafter, while committing rape, the first accused bite over her nose, cheek, left breast. She has further stated that while the second accused caught hold of the legs, the first accused forcibly committed rape and thereafter, the second accused also committed the same thing. She has further stated that thereafter, both of them brought her to the western side of the lake, where also they have committed rape once again and threatened not to disclose the same to anybody. Admittedly, the doctor has not noticed any semen connecting the accused. For that, there is acceptable explanation. If the oral evidence of P.W.1 that both the accused had committed rape on her, has to be accepted, then P.W.1 should have the bite injuries, over nose, cheek, left breast. It is not the case of P.W.1, that she sustained abrasion over the left breast, because of the animal behaviour exerc ised by the accused upon her, while committing the rape. Whereas, it is the specific case that she was bitten by A1. Therefore, if any injury is found on the above said body of P.W.1, it must be at least healed bite injury. Fortunately, for the accused and unfortunately for the prosecution, even in the wound certificate produced belatedly on 6.11.2000,

the doctor has stated categorically that the multiple small abrasion over the left breast could not be caused by teeth bite, thereby falsifying the oral evidence of P.W.1, thereby showing that she was not subjected to rape, as spoken by her. Unfortunately, the learned trial Judge has not taken into account this glaring discrepancy, which belies the case of the prosecution. Admittedly, P.W.1 was married, had two children, left the husband and lived with the deceased, having sexual activities. Therefore, the fact that the hymen absent or the hymen ruptured may not be a ground, to say positively, as held by the trial Court, that the accused have committed rape. Unfortunately, the trial Court considering injury Nos.1 and 5 in Ex.P.13, forgetting the fact, that the injury is not in accordance with the evidence given by P.W.1, came to the conclusion erroneously, in our considered opinion, that she was committed rape, by both the accused. The explanation offered by P.W.1, that she had not disclosed the murder as well as rape to anybody, fearing the threat committed by the accused, does not inspire confidence on us. In the absence of corroborative medical evidence, believing the unnatural oral evidence of P.W.1, which is undependable, in our considered opinion, sustaining conviction under Section 376 I.P.C. is not safe, as rightly submitted by the learned counsel for the appellant. The trial Court considering the case of the prosecution alone, forgetting the defence and the answers elicited during the cross examination, and more or less ignoring the same, took side towards the prosecution thereby landing in an erroneous conclusion, which is certainly has to be set aside, by our interference. For the foregoing reasons, the appeal deserves acceptance, and therefore, the same has to be allowed.

The appeal is allowed setting aside the conviction and sentence slapped by the trial Court in S.C.128 of 2001 on the file of Additional Sessions Judge-cum-Fast Track Court No.1, Salem, by judgment dated 29.1.2002 and the accused are acquitted of the charges against them holding that the prosecution has failed to prove the guilt of the accused, beyond all reasonable doubt, ordering them to release forthwith, if their detention is not required in any other case.

Index: Yes
Internet:Yes

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To

1) The Additional Sessions Judge-cum-
Fast Track Court No.I,
Salem.

2) -do- Thro' the Principal Sessions Judge,
Salem.

3) The District Collector,
Salem.

4) The Director General of Police,
Chennai-4.

5) The Superintendent,
Central Prison,
Salem.

6) The Inspector of Police,
Attayampatti Police Station,
Salem District.

7) The Public Prosecutor,
High Court,Madras.